(2) paragraph (c) had no application because the judgment appealed from involved merely the interpretation of the relevant sections in the Courts of Judicature Act, a federal law, and that law exclusively;

(3) the right of appeal under the Act extended to the Federal Court only in cases provided for by sections 64, 65 and 66 of the Act.

FEDERAL COURT.

Jag-Jit Singh and *P. K. Palasuntharam* for the applicant.

Ajaib Singh (Senior Federal Counsel) for the respondent.

Ong Hock Thye F.J. (delivering the judgment of the court): This is an application for leave to appeal to His Majesty the Yang di-Pertuan Agong from the judgment of this court given on August 7, 1967.

The applicant was convicted on October 27, 1964 in the sessions court at Alor Star under section 4(a) of the Prevention of Corruption Act 1961 and sentenced to 9 months' imprisonment, plus a fine of $446. He has since served such sentence and paid the fine. His appeal against conviction was dismissed on April 6, 1966 by the High Court at Alor Star in its appellate criminal jurisdiction.

The applicant next attempted to carry his appeal a stage further by way of an application under section 66(1) of the Courts of Judicature Act 1964. The section provides that —

"When an appeal from a decision of a lower court in a criminal matter has been determined by a High Court the judge may on the application of any party and shall on the application of the public prosecutor reserve for the decision of the Federal Court any question of law of public interest which has arisen in the course of the appeal and the determination of which by the judge has affected the event of the appeal."

When the application duly came on for hearing it turned out that the applicant had omitted to obtain from the High Court judge any certificate setting out the question of law of public interest which it was desired to reserve for the decision of the Federal Court. We accordingly extended the time within which he was required to produce the necessary certificate. The learned judge, however, was of the opinion that the case was not one in which such certificate should issue. In the result this court refused to entertain any further appeal for the reasons stated in the judgment delivered by the Chief Justice on August 7, 1967.

It is now submitted that leave to appeal to His Majesty the Yang di-Pertuan Agong should be given under either section 74(1)(b) or (c) of the Courts of Judicature Act, 1964. All that we need say about paragraph (b) is that the judgment appealed from was manifestly "final", and not an "interlocutory judgment or order."

As to paragraph (c), which relates to appeals "from any decision as to the effect of any provision of the Constitution", the short answer is that, again, in our judgment, it has no application, because the judgment appealed from involved merely the interpretation of the relevant sections in the Courts of Judicature Act, a federal law, and that law exclusively. The right of appeal, under the Act, extends to the Federal Court only in the cases provided for by sections 64, 65 and 66 of the Act.

The application is accordingly dismissed.

Application dismissed.

ATTORNEY-GENERAL v. SIM LIM INVESTMENTS LTD.

[O.C.J. (Winslow J.) November 21, 1967]

[Singapore — Suit No. 358 of 1967]

Income Tax — Statutory income — Dividend — Subsidiary company declaring — Whether parent company entitled to treat dividend declared and paid in subsequent year as having derived in preceding year — Income Tax Ordinance (Cap. 166), ss. 29, 35(7A) & 44(4).

Company Law — Dividend — Subsidiary company declaring — Accounting practice of parent company — Statutory income — Year of assessment — Income Tax — "Income from a dividend."

A subsidiary company declared a dividend in favour of its parent company on March 8, 1965. The parent company included such dividend in its accounts of the year ending December 31, 1964. The comptroller treated the dividend as having been derived in the year in which it was declared and paid i.e. 1965.

This decision gave rise to a liability under section 44(4) of the Income Tax Ordinance because, consequent thereon, there was an insufficiency of "franked" profits in respect of a dividend subsequently declared in the same year by the parent company.

In an action to recover the amount due under section 44(4) the issue before the court was whether or not the parent company was entitled to treat the dividend declared and paid in 1965 as having derived in 1964.

Held: (1) the statutory income of any person (whether an individual or a company) for any year of assessment in respect of dividends is the full amount of income from such dividends for the year preceding the year of assessment;

(2) such income must necessarily mean income from dividends already paid within the meaning of section 29 of the Ordinance.

Cases referred to:—

(1) *Whimster & Co.* v. *Commissioners of Inland Revenue* 12 T.C. 813.

(2) *Southern Railway of Peru Ltd.* v. *Owen (Inspector of Taxes)* [1957] A.C. 334.

(3) *Princes Investments Ltd.* v. *Inland Revenue Commissioners* [1967] 2 All E.R. 230.

(4) *Government of the Federation of Malaya* v. *A. Omnibus Co. Ltd.* [1963] M.L.J. 14.

The following cases were also cited in argument: *Comptroller of Income Tax* v. *B and C Co. Ltd.* [1966] 1 M.L.J. 286. *Patrick* v. *Broadstone Mills Ltd.* [1954] 1 All E.R. 163. *J. and M. Craig (Kellamaroch) Ltd.* v. *Cowperthawte* 13 T.C. 627. *F.S. Securities Ltd.* v. *C.I.R.* 41 T.C. 666. *Cenlon Finance Co. Ltd.* v. *Ellwood* 40 T.C. 176.

CIVIL SUIT.

Sat Pal Khattar (State Counsel) (*Tay Kim Whatt* with him) for the plaintiff.

G. S. Hill for the defendants.

Cur. Adv. Vult.

Winslow J.: On 8th March, 1965 Sim Lim Co. Ltd. which is a wholly-owned trading subsidiary of Sim Lim Investments Ltd. (hereinafter referred to as "the parent company"), declared a dividend of $1,192,500 pursuant to a resolution passed at its fifteenth ordinary general meeting held on 6th March, 1965.

On 17th August, 1965 the parent company declared to its shareholders a dividend of $811,162.50 and the tax deducted under section 44(1) of the Income Tax Ordinance (hereinafter referred to as the "Ordinance") amounted to a sum of $324,465.

In the accounts of the parent company the dividend then declared by the subsidiary in March 1965 was included by its auditors as income of the parent company for the year ending 31st December, 1964.

The computations of the Comptroller of Income Tax however treat the dividend declared by the subsidiary in March 1965 as income of the parent company for the year ending 31st December, 1965.

The sole issue in this case is the amount of tax payable by the parent company in respect of the year of assessment 1965, being the year in which it actually received the dividend declared by the subsidiary in March 1965. It is the comptroller's contention that since the subsidiary declared its dividend on 8th March, 1965 and paid the whole of this dividend over to the parent company in that year, such dividend will only be available as a credit to the parent company for the year of assessment 1966, and not 1965, as the defendants, who are the parent company, contend.

It should be noted that the plaintiff's claim on behalf of the comptroller is for the sum of $302,324.60 being a debt alleged to be due to the Government under section 44(4) of the Ordinance.

This amount of debt is alleged to be due not as income tax but by virtue of the provisions of sub-sections (3) and (4) of section 44 of the Ordinance which in effect provide that where a company has paid dividends to its shareholders during a year of assessment and has deducted tax at the rate of 40 per centum from such dividends, the excess of the amount of tax so deducted over and above the amount of tax payable by the company in respect of that year of assessment shall be a debt due from the company and recoverable as such.

There is no dispute about the amount of tax which has been deducted from the dividend paid by the parent company in August 1965, i.e., $324,465. The dispute in this case arises as to the amount of tax payable by the company in respect of the year of assessment 1965 in accordance with the provisions of the Ordinance.

If the parent company's computations are correct in the light of the view taken by its auditors that the dividends received from the subsidiary in 1965 were actually creditable to its income for 1964, then the plaintiff's claim would fail. If, however, the plaintiff's view is accepted, he must necessarily succeed.

I now propose to consider the two constrasting views.

It is contended on behalf of the parent company that as the term "income" is not defined in the Ordinance, one must start with a figure for such income which is based on normal commercial accounting practice subject only to express statutory modification. Several authorities, including *Whimster & Co.* v. *Commissioners of Inland Revenue* [1] at page 823 and *Southern Railway of Peru Limited* v. *Owen* (*Inspector of Taxes*) [2] at pages 352-358 were cited in support of this proposition. It was also pointed out that in England the Court of Appeal in *Princes Investments Ltd.* v. *Inland Revenue Commissioner* [3] at page 238 H - I and page 242 F - G confirmed the correctness of the accountancy practice as to which evidence was given in the present case supporting the contention that in drawing up the account of a holding company such as the parent company in this case, it is a proper commercial method of accounting to anticipate dividend by showing the profits out of which the dividend is paid in any particular year as its income for the preceding year. In short, it is contended, in this case, that proper accounting practice approves what was done in the current case by the auditors in treating the dividend which was declared by the subsidiary in 1965 as the parent company's income for 1964.

It was argued that, if this contention is correct, it follows that the amount of tax payable by the parent company in respect of 1965 should take into account its income for 1964 which would include the dividend declared by the subsidiary in 1965.

The plaintiff, on the other hand, contends that statutory recognition has not been granted in Singapore to consolidated accounts of a group of companies such as the Sim Lim Group and that, without acceptance of such accounts, a parent or holding company such as the defendants cannot properly anticipate dividends from any of its subsidiaries and claim them as income for the year preceding that in which such dividends are actually received. It was submitted on behalf of the Attorney-General that the expres-

sion "dividend" must necessarily mean "dividend which has already been received" and that the meaning of section 35(7A) of the Ordinance was quite clear. That subsection reads as follows:—

"The statutory income of any person for any year of assessment in respect of dividends shall be the full amount of the income therefrom for the year preceding the year of assessment notwithstanding that the source of such income is not possessed by him during the year of assessment".

It seems to me that one must carefully consider all those provisions of the Ordinance relating to dividends, namely, section 10(1)(d), section 29, section 35(7A), section 44 and section 46 of the Ordinance in order to ensure that there is nothing in such provisions which in any way modifies or runs counter to the proper accounting practice, of which evidence was given, assuming of course that such practice is acceptable in Singapore notwithstanding the fact that statutory recognition has not been granted to the consolidated accounts of group companies consisting of a parent company holding shares and a controlling interest in subsidiary companies where all the trading is done by the subsidiaries and the parent company looks for its dividends entirely to them.

Section 10(1)(d) merely imposes a tax on dividends. Sections 44 and 46 relate to the tax deductible from dividends which have already been paid and for certain allowances for tax so deducted from such dividends. There remain, therefore, only section 29 and section 35(7A) which appear in Part IV and Part V of the Ordinance relating to ascertainment of income and ascertainment of statutory income respectively. Section 29 reads as follows:—

"The income of a person from a dividend paid by a company liable to tax under this Ordinance or Commonwealth income tax within the meaning of subsection (3) of section 48 of this Ordinance, shall, where any such tax has been deducted therefrom, be the gross amount before making such deduction; where no such deduction has been made, the income shall be deemed to be such a gross amount as after deduction of tax at the maximum rate deductible at the date of payment would be equal to the amount received".

I would emphasise the fact that this section clearly relates the income of a person to the income which he receives from a dividend actually paid by a company liable to tax and goes on to provide that such income shall, where any tax has been deducted therefrom, be the gross amount before such deduction, etc. It should be noted that the definition of "person" includes a company and it is clearly within the contemplation of this section that a company which receives a dividend paid by another company should be governed by its provisions.

I am of the opinion, therefore, that no person, whether a private individual or a company, can regard a dividend as that person's income unless such dividend has actually been paid to him by the company declaring the dividend.

This certainly helps to clarify the provisions of section 35(7A) which declares the statutory income of any person in respect of dividends to be the *full* amount of the income *therefrom* for the year preceding the year of assessment. I would stress the importance of the words "full" and "therefrom" which I have italicized.

It is this particular subsection (7A) which is the corner stone of the edifice built by the legislature on which the success or failure of the plaintiff's claim substantially depends. As I have already stated earlier, section 29 of the Ordinance throws considerable light on what the legislature intended. The sole question now for me to determine is whether the intention of the legislature has been expressed in such clear terms as to make its actual meaning plain and unambiguous. It is conceded by the defendants that, in the case of a private individual who is a shareholder in a company, it is the year in which such person is paid his dividend that counts. Should a different meaning be given to this subsection in the case of a shareholder who happens to be a company merely because accounting practice regards the dividend paid to it as its income of the preceding year?

In my opinion such a conclusion would be erroneous and contrary to commonsense. The subsection in question cannot surely have different meanings depending on whether a shareholder is a private individual or a company. Section 29 reinforces section 35(7A) in circumstances which, to my mind, can lead to only one conclusion, namely, that the statutory income of any person (whether an individual or a company) for any year of assessment in respect of dividends is the full amount of income from such dividends for the year preceding the year of assessment and that such income from dividends must necessarily mean income from dividends already paid within the meaning of section 29 of the Ordinance. It would be strange if one were to give the expression "income from a dividend" a meaning such as that for which the defendants contend because to do so would be to equate an income which arises from a dividend to the income out of which an anticipated dividend is subsequently paid.

It follows therefore that the assessable income of the defendants for the year of assessment 1965 has been correctly computed by the comptroller. The net result is consonant with the result reached by the Privy Council in *Government of the Federation of Malaya* v. *A. Omnibus Co. Ltd.*[4] which approved the dissenting judgment of Thomson C.J., as he then was, in the Court of Appeal, in the same case, reported at page 92 of the [1961] *Malayan Law Journal*. Referring to section 40 (our section

44) Lord Pearce, in the Privy Council, said, at page 16, that it provides a sensible and intelligible scheme but observed that no general hardship is created by this scheme. He went on to say:—

"A particular hardship may arise in a case like the present where the holding company chose to pay out an increased dividend (with the consequent increased deduction of tax) in the same year as it received an increase from the B. company with the result that the tax deducted by the company from its shareholders has to be taken into account in 1956 whereas the tax which the company will have to pay in respect of the increased dividend so received from the B. company will not be payable or fall to be taken into account until the following year. And by that time the Government have already become entitled to any excess created by the increased deduction of tax in 1956. Such a situation would not arise in the case of an ordinary trading company which does not distribute its profits during the year in which they are earned but in the following year which is the year of assessment in respect of those profits".

But a hardship such as that referred to above was within the control of the parent company in the present case and could have been avoided by the simple expedient of waiting for a further 4½ months till the beginning of 1966 before it declared the dividend which it did on 17th August, 1965. It is unfortunate perhaps that the sum in question may be irretrievably lost to the defendants, according to the opinion of Mr. Franklin, who gave evidence as an independent accountant with regard to the accounting practice affecting group companies. I would also add that I was at one stage somewhat attracted by the able submissions made by Mr. Hill on behalf of the defendants with regard to the accounting practice in question and its judicial acceptance in England but the case really turns on whether our Ordinance has expressed its meaning in such sufficiently clear terms as to override accounting practice, which, I think, it has done.

Judgment will accordingly be entered for the plaintiff with costs.

Judgment for the plaintiff.

Solicitors: *Rodyk & Davidson.*

STEPHEN KALONG NINGKAN v. GOVERNMENT OF MALAYSIA

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) & Ong Hock Thye F.J.) December 1, 1967]

[K.L. — Federal Court Suit No. X. 1 of 1967]

Constitutional Law — Proclamation of emergency — Emergency as ground for amendment of Federal Constitution and Constitution of State of Sarawak — Emergency "whereby the security of the Federation or any part thereof is threatened" — Plea that proclamation was in fraudem legis — Validity of proclamation questioned as ultra vires Federal Parliament — Power of Federal Parliament to amend Constitution of State of Sarawak questioned — Defence of Crown privilege — Judicial review of executive action — Constitution of Malaysia, arts. 4, 40(1), 79, 150(1), (5) (6) & (6A) and 161E(2) — Constitution of State of Sarawak, art. 41 — Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, ss. 3, 4 and 5.

On July 22, 1963 the petitioner was appointed Chief Minister of Sarawak and so acted as leader of the majority party in the Council Negri. On June 16, 1966 the Governor, acting on representations said to have been made to him by the majority in the Council that they had lost confidence in their Chief Minister, requested the petitioner to resign. Upon his non-compliance the Governor, on June 17, 1966, purported to dismiss him together with other members of the Supreme Council and appointed Penghulu Tawi Sli as Chief Minister. Action being brought in the High Court at Kuching, Harley Ag.C.J., on September 7, 1966 declared the dismissal of the petitioner void ([1966] 2 M.L.J. 187). On September 14, 1966, His Majesty the Yang di-Pertuan Agong proclaimed a state of Emergency in Sarawak. On September 19, 1966 the Federal Parliament passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, amending clauses (5) and (6) in article 150 of the Federal Constitution by inserting after "this Constitution" the words "or in the Constitution of the State of Sarawak" and providing further that, notwithstanding anything in the State Constitution, the Governor may summon the Council Negri, suspend standing orders and issue directions binding on the Speaker. Pursuant thereto, the Governor, on September 23, 1966 summoned a meeting of the Council Negri, which passed a vote of no confidence in the petitioner; he was then dismissed the following day.

In his second action in the High Court at Kuching the petitioner claimed (a) that the proclamation of a State of Emergency, being made on the advice of the Federal Cabinet, was null and void in that it was not made *bona fide* but *in fraudem legis*, and (b) that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, was on that account null and void. On December 2, 1966 Pike C.J. (Borneo) holding *inter alia* that an action to declare a Federal law invalid required leave of a judge of the Federal Court before commencement of proceedings, by virtue of article 4 of the Federal Constitution, ordered certain paragraphs in the statement of claim struck out ([1967] 1 M.L.J. 46). On February 20, 1967 leave was given by the Lord President for institution of proceedings against the Government of the Federation of Malaysia for a declaration that the said Act was invalid and/or that sections 3, 4 and 5 thereof were invalid as being *ultra vires* the Federal Government. In his petition the petitioner alleged that no grave Emergency had arisen in the State of Sarawak which could not be effectively dealt with under the previous proclamation of emergency made on September 7, 1964, that the Federal Cabinet well knew that no such emergency existed "whereby the security or economic life of Sarawak was threatened"; that the proclamation was *in fraudem legis* in that it was made not to deal with grave emergency whereby the security or economic life of Sarawak was threatened but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak, and that the amendment of clauses (5) and (6) of article 150 of the Federal Constitution were null and void as *ultra vires* the Parliament and contrary, not only to article 150 and article 161E(2) of the Federal Constitution, but also the entrenched provisions in article 41 of the Sarawak Constitution and relevant provisions in the Malaysia Act, 1963.

Held (by Barakbah L.P. and Azmi C.J. (Malaya), Ong Hock Thye F.J. dissenting): (1) it is incumbent on the court to assume that the Government was acting in the best interests of the State and to permit no evidence to be adduced otherwise;

(2) the Yang di-Pertuan Agong alone could decide whether a state of emergency, whereby the security or economic life of the Federation was threatened, existed;